No. 10063

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS STANGER,
Appellees.

BRIEF OF APPELLEES

Appeal from the District Court of the United States for the District of Idaho, Eastern Division..

JOHN FEREBAUER
Idaho Falls, Idaho
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STATEMENT OF FACTS

That on January 13, 1940, the plaintiffs purchased of and from the defendant as such common carrier two passenger tickets paying the full price therefor entitling them to ride on defendant's passenger trains from Idaho Falls, Idaho, through the State of Idaho, through the State of Wyoming and to Denver in the State of Colorado and on to Houston in the State of Texas. That on January 13, 1940, as aforesaid, the plaintiffs boarded one of defendant's passenger trains at Idaho Falls, Idaho, and rode in a standard pullman car, which car constituted a part of one of defendant's passenger trains, from the City of Idaho Falls, Idaho, to a point approximately 37 miles from the City of Denver in the State of Colorado, at which point on January 14, 1940, a number of

cars of defendant's said passenger train, including the standard pullman car in which the plaintiffs were riding, derailed or wrecked (R. 14).

That at the time of the derailment or wreck the passenger train of the defendant consisted of a number of passenger cars, there being 7 or 8 passenger cars in said train, to which an engine was attached, and that at the time of the said wreck or derailment or immediately before, the said passenger train was traveling at a speed of between 60 and 65 miles per hour. The weather at the time of the derailment or wreck was cold and there was snow on the ground. At the time of the said wreck or derailment the said engine and cars were traveling upon the defendant's line of railroad and was under the care, management and control of the defendant company, its agents, servants and employees, who were then and there acting within the line, scope and course of their employment (R. 14).

That at the time of the accident or derailment or wreck the plaintiffs were seated in the seats of the standard pullman car. The plaintiff Phyllis Stanger was facing the direction in which the train was moving and her husband was seated directly across the table from her and both were seated next to the windows of said standard pullman car. Plaintiffs with two other persons who were riding upon said train were seated at a card table that had been furnished by the defendant company and were engaged, at the time of the wreck, in a game of cards. At the time the wreck or derailment occurred the plaintiff Phyllis Stanger was thrown suddenly and violently and without warning forward striking her in her abdomen across and against the edge of the said card table and was

thrown with great force and violence against other parts of said car severely and permanently injuring her internally and bruising and inflicting upon her injuries about the back, legs and hand. The card table that had been furnished by the defendant as aforesaid and that was being used at said time and place by the plaintiffs was firmly attached to the side wall of the pullman car in at least two places by iron braces or attachments. The top of said table was approximately 27 inches above the floor of the standard pullman car and was approximately 2½ feet wide and approximately 3 feet long, the edge of the said table being approximately ½ inch in depth or thickness (R. 15).

That at the time of the derailment or wreck the pullman car in which the plaintiffs were riding was derailed or left or was thrown from the rails upon which it had been traveling and the end of the standard pullman car in which the plaintiffs were seated and riding left the rails of the railroad track and went down into the barrow pit and struck against a bank of solid or frozen earth that was approximately 4 feet high causing the said car to come to a sudden violent stop. The rails upon which said car had been traveling before being derailed were torn loose from the ties to which they had been attached and were twisted and bent. When the standard pullman car came to rest after the derailment it was in a tilted position and standing at an angle from the tracks (R. 16).

That at the time of the accident the plaintiff Phyllis Stanger was thrown forward violently against the edge of the card table that had been furnished for her use by the defendant company and struck her on and across her abdomen on

and against the said card table with such force and violence that she very shortly thereafter, and before leaving the scene of the wreck, began to flow excessively. Which excessive flowing continued from the time immediately after the accident and until after her return home at Idaho Falls, Idaho, and until she underwent a surgical operation by one Dr. Hatch at Idaho Falls, Idaho, in July of 1940. That at the time the surgical operation was performed upon her by the said Dr. Hatch in July of 1940 her uterus was removed because of the said injuries received at the time of the accident, and the resultant excessive flowing, and the removal of her uterus thereby making her sterile, which condition is permanent and deprives her of a natural gift. That the removal of her uterus was necessary in order to stop or correct her excessive flowing of blood. That the nervous stress and nervous shock received at the time of the accident and derailment caused and greatly contributed to her excessive flowing. That at the time of the said accident and derailment the said Phyllis Stanger received great nervous shock and injury and experienced at said time and place severe nervous stress in addition to the actual physical injuries. And because of the excessive flowing and the length of time the same continued the said plaintiff Phyllis Stanger became physically weak and in a general run-down physical condition. That prior to the accident the plaintiff was a young woman approximately 28 years of age, the mother of three children and enjoying reasonably good health and was able to and did perform the greater portion of the ordinary duties of a housekeeper, wife and mother (R. 17).

That after the accident and until a few weeks before the trial of the cause she was unable to perform her household

duties because of her physical weakness and her nervous condition brought about by said excessive flowing and as a result of the injuries received in said accident, and the plaintiffs were compelled to and did employ a maid to perform the work about the house and home that the said Phyllis Stanger had theretofore performed prior to the accident (R. 18).

That the excessive flowing that commenced immediately after said accident and all of the personal injuries received by the plaintiff Phyllis Stanger in said accident were proximately caused by and due to the negligence and carelessness of the defendant, its agents, servants, and employees acting within the line, course and scope of their employment. That the excessive flowing and the removal of the uterus of the said Phyllis Stanger thereby making the said plaintiff Phyllis Stanger sterile and the nervous shock and all of the personal injuries suffered and received by the said plaintiff Phyllis Stanger in said accident were due to and proximately caused by the negligence and carelessness of the defendant, its servants, agents and employees acting within the line, course and scope of their employment in failing in their duty of inspection of the passenger cars and equipment prior to the time the said accident occurred (R. 18).

That in an effort to effect a cure for the injuries of the plaintiff Phyllis Stanger a surgical operation was performed upon her and the plaintiffs incurred large expenditures of money for physicians and surgeons, hospital bills and nurse's hire and medicines (R. 19).

That the defendant, its agents, servants and employees, at the time and place of the derailment mentioned herein and

the accident that occurred and prior thereto owed to the plaintiffs who were riding as paid passengers on a regular passenger train in charge of, controlled and under the management of the defendant, its agents, servants, and employees, a high degree of care for their safety, and the duty of inspection, control, maintenance and management of the passenger cars and the trucks underneath the same and all other equipment connected therewith, and that if the defendant, its agents, servants and employees then and there acting within the line, course and scope of their employment had exercised and discharged to the plaintiffs that degree of duty and degree of care of inspection and maintaining and management and controlling of its passenger equipment and cars and trucks and other equipment connected therewith, prior to the time the accident occurred, that is required by the law of common carriers by rail engaged in the transportation of paid passengers on passenger trains for hire as under the facts and circumstances disclosed by the evidence herein, the derailment and the resulting injuries of the plaintiff Phyllis Stanger in Case No. 1149 would not have occurred (R. 19).

The facts and circumstances of this case bring the plaintiffs within that class of cases that where the circumstances of the occurrence that has caused injuries are of a character to give ground for reasonable inferrence that if due care had been employed by the defendant, charged with care, the occurrence that happened would not have happened, and gives ground for the reasonable inferrence in this case that if due care had been employed by the defendant, its agents, servants and employees, who were then and there charged with care in the

inspection, maintenance, management and control of its passenger cars and for the equipment connected therewith that the occurrence that happened would not have occurred. This presumption must be rebutted by the defendant. The defendant by its evidence in the case of Albert G. Stanger and Phyllis Stanger having failed to rebut the inferrence of negligence drawn from the facts and circumstances of this accident that if due care, inspection and management and control had been employed by the defendant, its agents, servants and employees, the derailment and consequent injuries would not have occurred. That it appears clearly from a fair analysis of defendant's evidence that the defendant, its agents, servants and employees acting within the line, course and scope of their employment, did not, prior to the accident, exercise or use or discharge that degree of care of inspecting, maintaining, managing and operation of its passenger equipment that the law requires of it as under the facts and circumstances in these cases required. That all of the injuries and loss received by the plaintiff Phyllis Stanger aforesaid were proximately caused by and due to the negligence of the defendant, its agents, servants and employees while acting within the line, course and scope of their employment (R. 19-20).

That the plaintiff Phyllis Stanger suffered and sustained as a result of the derailment proximately caused by and due to the negligence and carelessness of the defendant, its agents, servants and employees, severe and permanent injuries that have caused, since the time of the accident and will continue to cause her nervousness and physical suffering and discomfort so long as she may live. She has suffered and sustained the per-

manent loss of a natural gift by the removal of her uterus by reason of the injuries she received at the time the accident occurred, thereby making her sterile (R. 20-21).

APPELLEES' TESTIMONY

Albert G. Stanger and Phyllis Stanger are husband and wife and reside at Idaho Falls, Idaho (R. 125-126). On January 13, 1940, they purchased of and from the appellant herein tickets entitling them to ride upon one of appellant's passenger trains from Idaho Falls, Idaho, to Houston, Texas, paying the full price for said tickets (R. 60-61). At a point approximately 30 miles before arriving at Denver, Colorado, and about 9:30 A. M. of January 14, 1940, the passenger train on which the appellees were riding was derailed or wrecked (R. 63-64).

At the time the wreck occurred appellees were seated at a card table engaged in a game of cards. They were using a table that had been furnished by the defendant company. Which table was securely anchored into the wall of the pullman car (R. 63-64). The train suddenly and without warning and while moving at a speed of approximately 65 miles per hour left the rails or was wrecked going into the barrow pit (R. 65-66). The derailment occurred all of a sudden; appellees were knocked from side to side with the jolting of the car; screws were on the floor; seats thrown out of place; and splinters were lying around, and the glass in the window by which appellees had been sitting was broken (R. 66-67).

After the wreck the car in which appellees had been riding rested at an angle in the barrow pit (R. 68). The weather

at the time was cold and snow was on the ground (R. 67-68).

Phyllis Stanger commenced flowing at the wrecked car (R. 69-70). After the wreck an automobile was hailed and appellees were taken to Denver where the Railroad doctor was called and administered some aid to Mrs. Stanger (R. 70-71). Phyllis Stanger complained of pain, immediately following the wreck, in the abdominal region and continued to flow from the time of the wreck (R. 72).

Phyllis Stanger prior to the injuries received in the train wreck did her housework, but from the time of the wreck up until the time of trial had been unable to perform her duties about the house (R. 81). The reason she did not perform her work about the house since the time of the wreck was because of ill health (R.81-82). Help was not employed to assist Mrs. Stanger in her household work before the accident. A doctor bill was paid for Mrs. Stanger's injuries in the sum of $300.00, and a hospital bill in the sum of $200.00, besides the special nurses, the blood transfusions, etc. (R.82-83). Appellees, husband and wife, at the time of the trial had been married ten years and were the parents of three children (R.125-126).

At the time of the derailment Phyllis Stanger was facing the direction in which the train was moving (R. 126). The first Phyllis Stanger knew there was a wreck was when there was a violent rocking back and forth of the train and she was thrown against the card table and then towards the side of the car (R.127). The table against which she was thrown was securely fastened to the wall. The table struck her in the abdomen and pushed her against the side of the car and threw her against the car, her right side against the car. In addition

to striking the abdomen she received a cut on her leg. There was dirt, bolts and broken parts of the car on the floor, and the sides where the seats were the seats were jammed together by the wreck. It was an awful mess (R. 127).

After the car stopped Mrs. Stanger laid there for a while until she was assisted up, and she was assisted out of the car with the assistance of the other men. She had a terrific pain in the abdomen at that time. She was assisted out of the car to the door of the car and then assisted out of the door of the car to the outside. She immediately started flowing and had just finished her monthly period two or three days before starting on this trip (R. 127-128).

At the time of the wreck it was cold and there was snow on the ground. After the wreck Mr. Stanger hired a car and took his wife to the station at Denver (R.129). From Denver Mrs. Stanger rode in a pullman car to Houston. She was very nervous and not able to sleep at all the first night. Mrs. Stanger stayed at the hotel. She did not attend any meetings and stayed at the hotel most of the time. She had the sensation that they were having a wreck all of the time (R. 129). She arrived back home January 29 or 30th. She stayed in bed most of the time to see if she couldn't check the flowing, and finally went to the doctor about two weeks after returning home.

From the time of the wreck she continued this flowing, and it became worse and worse, and as time went on the nervous condition got worse. The doctor tried to take care of her at that time, and instead of the condition improving it still got worse. She became more nervous and excited and couldn't sleep at night. The doctor who attended her was Dr. Ray

Hatch (R. 130-131). She lost fifteen pounds in weight (R. 132).

Prior to the time of the wreck Mrs. Stanger looked after her housework and did her housework without hired help. After returning from this trip and after this train wreck occurred she was unable to do her housework and had to have help. She had to have help up to within three days before the trial of this cause (R. 131).

Dr. Hatch performed an operation on Phyllis Stanger in July, 1940, which operation stopped the hemorrhaging (R. 132). As a result of the hemorrhaging Phyllis Stanger lost fifteen pounds weight (R. 132).

Previous to the trip in January the physical condition of Phyllis Stanger and three months previous had been perfect. She was in a better condition than she had been for a long time. That three months before she had been to a doctor because her period which was normally four days had gone to about a seven-day period. The doctor checked her up and she had been in perfectly normal health up to the time of the wreck (R. 132-133).

At the time of the wreck Mrs. Stanger was seated next to the window. After arriving at Denver and during the afternoon she went to a horse show at Denver, and had dinner again afterwards at the Athletic Club after the horse show (R. 133) (R. 135-136). At the time of the wreck the weather was freezing with snow on the ground (R. 137). Prior to the time of the wreck Phyllis Stanger had been to but one doctor for treatment (R. 137). Dr. Miller took care of her at the time of the birth of her last child (R. 137-138).

Prior to going to Dr. Woolley Mrs. Stanger had not been troubled with excessive flowing, but her period of flowing was approximately three days longer than her normal period, which was four days. She did not go to Dr. Miller to have this condition corrected. She had never planned the kind of operation performed upon her by Dr. Hatch (R. 139). Dr. Woolley never made an examination of Phyllis Stanger. He merely gave her liver shots, which treatment did stop the flow of blood (R. 139).

Before going on this trip Mrs. Stanger was not nervous nor easily fatigued. The reason for her going to the doctor is because she felt that she was not picking up as fast as she should after the birth of her last child. At the time Mrs. Stanger called on Dr. Woolley, and before the wreck occurred, she was not nervous at all, compared to what she had been since the wreck occurred (R.140-141). In October, 1940, Mrs. Stanger called on Dr. Woolley for a check-up, and he informed Mrs. Stanger that it was all cleared up, and from the personal knowledge of Mrs. Stanger it was cleared up (R.141-142).

Mrs. Stanger denied telling Dr. Brothers, who examined her in the L. D. S. hospital, October, 1941, that she had been flowing excessively since the birth of her last child. She did not say anything to Dr. Brothers about her condition of flowing at any time. Mrs. Stanger did not state to Dr. Woolley in November, 1940, at Idaho Falls that she had flowed excessively during the past four years. She did not go to Dr. Woolley for treatment for excessive flowing, but went to see him to find out why she was not building up as fast as she felt she should (R. 305-306).

Dr. H. Ray Hatch resides at Idaho Falls, Idaho, and is a physician and surgeon duly licensed to practice medicine and surgery under the laws of the State of Idaho, is a graduate of Rush Medical College, and has had a series of post-graduate work. He has been practicing since 1910 (R. 83-84).

He saw Mrs. Stanger February 12, 1940, and states from his examination he found her to be a very nervous girl on a rather high nervous and low emotional threshold. The emotional responses were out of proportion with the other condition. She complained of severe uterine bleeding. From examination the doctor found her to be suffering from unusual bleeding (R. 85). Dr. Hatch prescribed emotional nervous sedatives, tonics and various intravenous injections to bring up the blood supply in attempting to meet such factors that caused this bleeding. She did not respond to this usual treatment (R. 85). The bleeding continued at a rather alarming state, and the blood equality or oxygen carrying properties of the blood were effected until her hemoglobin was 48 percent. In order to meet this she was operated on, after being given blood transfusions, on July 9, 1940, and removed this bleeding uterus. The removal of the uterus made her sterile (R. 86).

The amount of Dr. Hatch's bill was between $300 and $400. Dr. Hatch treated her from February to July, 1940, and at the time of the trial she had been to see the doctor occasionally. Her treatment was active from February 12, up to December 31, 1940. She did not bleed after the operation (R. 86-87).

People of this latitude in good health range from 85 to 105 or 110 percent hemoglobin, and 48 percent is based upon

that normal standard. Dr. Hatch removed the uterus and the womb and the right ovary. The reason for the removing of the ovary was there were some cists, and the principal reason was that in the removal of the uterus to which the ovary is closely related, and the blood supply to the ovary was sufficiently interferred with owing to this fact, and there were some small cists, it was considered that it would be better to remove it than to leave it with inadequate circulation (R. 87-88). A cystic ovary does not necessarily cause bleeding. Dr. Hatch could not see that it caused bleeding in this case. The ovary was slightly cystic. The removal of the ovary in this case had nothing to do with the bleeding. The ovary would have been removed independent of this cist because of what the doctor considered the inadequate blood supply. The doctor did not think that its condition had anything to do with the bleeding (R. 88-89).

The fibrous condition of the uterus is a process that comes on unavoidably with women as they approach the change of life (R. 89). The uterus was removed to stop the excessive bleeding (R. 90). A fibrosis uteri with diffuse endometrial hyperplasia is an independent condition and occurs more frequently in women of advanced years, but also occurs in young women (R. 91). The bleeding was not continuous down to the time of the operation from the birth of the child. There was a long period that she was free from excessive flow either as to amount or duration for some time previous to my treating her (R. 92-92). The prolonged bleeding after child birth did not indicate fibrous uterus or cystic ovaries or chronic fibrous cervicitis. Bleeding that is prolonged after

child birth is what medical men call sub-involution (R. 93-94).

The treatment given Mrs. Stanger by Dr. Woolley after the birth of her last child up until the operation was for prolonged flow, and she had been helped by shots given her by the doctor (R.95). Follicular cists are not of much significance (R. 95-96). It is not an exceptional condition. Such condition may exist in a woman who might be well so far as the ovaries are concerned (R. 98-99). Toxemia pregnancy is not caused from excessive flowing (R. 100-101). Mrs. Stanger told Dr. Hatch about the train wreck she had been in, the fact of the accident and the effect of it, the wreck that occurred near Denver January 14, 1940 (R.106-107). From the examination made by the doctor before the operation the condition he found of the pelvic organs including the uterus did not warrant the operation independent of the bleeding (R. 107-108). The physical findings before the operation did not disclose enough definite abnormality to justify the operation if it had not been for the bleeding (R. 109).

APPELLANT'S TESTIMONY

Robert J. Lewis was engineer on the train at the time of the derailment. The derailment occurred at Houston. It is merely a side track for the loading of sugar beets (R.172-173). A broken wheel was found on the right side of the truck, the lead wheel on the rear truck on the rear end of the fourth car (R. 175). The four cars that remained attached to the engine were not wrecked. The train was late leaving Cheyenne and at the time of the accident (R. 176). The engineer did not observe anything any different in the way the train or engine rode. A tourist car was completely off the rails, a standard pullman and a tourist car and one other car that was a tourist car back at the rear end. Four cars had broken off the other portion of the train, and three of the four were off the track. The rails were spread at the point of the wreck. The engineer did not know when the wheels under the car or the wheel that broke were inspected or what the inspection consisted of (R. 176-177). The pullman car was leaning over at quite an angle, was not completely over. It went off the track to the right, the cars were lying at an angle. The ground at the point of the wreck was frozen. The engineer did not know where the trucks were that had been under the pullman car (R. 178-179).

The engineer did not know as to whether the gauge of the track was wide or tight at the point of the wreck. Could have been either. And when the engineer testified there was no defect he did not refer to that defect (R. 179). The web of the wheel was intact; the rim was gone. If the wheel broke and caused the wreck, the engineer was unable to state how far the cars

would move before they derailed. The engineer did not know and was unable to state whether the wreck caused the broken wheel or the broken wheel caused the wreck (R. 180-181). Spread track is where the gauge of the track is wider than the wheels. An engine of the type being used at that time weighs in the neighborhood of 200 and some odd tons. The baggage car and standard pullman is 90 or 100 tons. After the wreck the rails were badly twisted (R. 181-182). The engineer did not know whether the rails were broken or not (R. 183). They may or may not have been. The section foreman was not on duty on the day the wreck occurred, but went to the derailment after he had found out about it (R. 184). About 300 feet of rails was broken out (R. 188). No work had been done at the point of the wreck for over 30 days prior to the time of the wreck, only cleaning the snow out of the switch (R.189). As to what may have occurred to the track between the time the section foreman last inspected it and the time of the wreck he did not know. And as to the condition the track was in as to being a tight or wide gauge at the time of the wreck he did not know (R. 191-192). He did not know whether the gauge on the wheels of the engine was wide or tight. He did not know anything about the wheel that was broken. He did not know anything as to the age of the wheel (R. 191-192).

Dr. Hoyt B. Woolley, age 32, rendered the plaintiff, Mrs. Stanger, professional services first on November 10, 1939, (R. 213). The blood count at that time showed 42 percent hemoglobin (R. 217). He stated that he would not state that he told her that her condition had all cleared up (R. 218).

Dr. Woolley stated he did not examine Mrs. Stanger on December 14, 1939 (R. 220). There is no connection between the cystic ovary and the excessive flowing (R. 224). Dr. Woolley was a member of the staff of the Railroad physicians and had been since August, 1938 (R. 229). And was still a member of the medical staff of the Union Pacific at the time of the trial (R. 229-230). Dr. Woolley never mad a pelvic examination of Mrs. Stanger, nor did he see any portion of the uterus that was removed. A person who was run-down and nervous having high nervous tension might contribute to excessive flowing. The first time Dr. Woolley saw Mrs. Stanger was November 10, 1939, and the last time he saw her was December 14, 1939 (R. 234-235). The records of Dr. Woolley only indicated two other visits by Mrs. Stanger. Dr. Woolley gave Mrs. Stanger shots and that they had the desired effect. Mrs. Stanger responded to that type of treatment and when Dr. Woolley last saw her this flowing had entirely cleared up. She responded to the treatment given, well, and the treatment given by Dr. Wooley stopped the excessive flowing, and she didn't have any flow on December 14, and she had cleared up and was building up physically (R. 235-236-237). Her hemoglobin count had built up during the thirty-day period from 42 to 68 percent. That would be an average response to this type of treatment. Excessive flowing comes from a legion of causes, and the condition found by Dr. Woolley in the pathological report was only one of the causes. And Dr. Woolley's statement that Mrs. Stanger had fibrosis uterus was based upon the history of the case (R. 240-241). Dr. Woolley never did during the time he treated

Mrs. Stanger suggest to her that she have an operation to remove the uterus to effect a cure (R. 250-242).

Dr. W. W. Brothers examined Mrs. Stanger at Idaho Falls, Idaho, pursuant to agreement of counsel October 9, 1941 (R. 245). Mrs. Stanger had been treated by hypodermic injections, which showed some improvement and she was feeling better, and at the time of the accident she was playing bridge when the car stopped suddenly and she was thrown suddenly against the edge of the table injuring her abdomen. This made her extremely nervous and caused her to flow the flow coming on immediately after the accident (R.247). Examination disclosed a woman quite intelligent, pulse regular, teeth good condition, tonsils good, no apparent infection of the larynx; no murmers, blood pressure 118/80 (R.247-248). The operation of Mrs. Stanger resulted in sterility. Dr. Brothers testified that if Mrs. Stanger had been his patient and had been responding to treatment other than surgery he would not operate if she was getting well. He would not advise an operation (R. 251). The excessive flowing does not always exist where the uterus has become fibrous. Dr. Brothers was on the medical staff of the Union Pacific Railroad Company. Mrs. Stanger told Dr. Brothers that she was thrown suddenly forward and struck across the edge of the card table (R.252-253). Dr. Brothers testified that it would be possible to have excessive flowing for a time, and that a violent blow across the abdomen would contribute to excessive flowing, that it might be a contributing cause, and there probably would be a connection between the two (R. 257). And to some extent severe nervous shock followed by physical injury and high nervous

tension would tend to some extent to increase excessive flowing (R. 255, 256, 257, 258). And that excessive flowing may be contributed to by being in a wreck such as Mrs. Stanger was in. That it might be contributed to, the excessive flowing, by injury, or might be contributed to by nervousness, but that would only be temporary. As to the length of time it may continue would depend to some extent upon the individual. It would depend on how long she was nervous (R.258-259-260). The doctor could not say whether or not such increased flowing would continue during the time of the nervousness or the nervous tension existed (R. 260).

John A. Schroder, General Car foreman, Union Pacific, since 1920 in the car department. He tesified the head four cars were on the rails when he arrived there. He found a broken wheel on the truck, the lead wheel on the right hand side (R. 267-268). The train consisted of a mail car, two baggage cars, a coach, pullman tourist, another coach, a pullman standard, and another car, eight cars altogether (R. 268-269). There was no derailment of the cars coupled to the engine. There were no broken parts inside of the Pullman car, no seats were broken, no windows broken, no loose bolts or anything of that sort. The top of the table was 27 inches from the floor of the pullman car. From the top of the seat to the top of the table, free height 10¼ inches (R.270). The engine and train crew were present when Mr. Schroder got to the scene of the wreck. The engine crew consisted of the engineer and fireman. Both were there at that time. Mr. Lewis was engineer, did not know the fireman. The train conductor was Mr. Cross, did not know the names of either of the brakemen. He

did not see a pullman conductor or pullman porters. The trucks of the pullman car left the rails. He did not profess to testify as to what caused the wreck (R. 272-273). He does not know what else besides the broken wheel may have been wrong. There were six wheels under each end of the pullman car, twelve wheels altogether under a car. The trucks are generally cast in one unit, a unit which holds the wheels and axles; there are axles, wheels, journals in journal boxes all equipped with equalizers to equalize any shock in the road (R. 272-273). The front end of the pullman car was down in the ditch and lower than the other end. The grade of the barrow pit was about four feet deep. The broken wheel was on a car that had not been derailed (R. 274). He made no inspection of the track, and as to the gauge of the track he was unable to state. All of the wheels of all four cars that had derailed were off the rails. There was the same number of trucks under all of the cars as the pullman car had (R. 275-276). There was nothing disturbed inside of the pullman car; no seats torn loose, none of the berths had fallen down, no upper berths down, no pieces of metal or screws or bolts laying around, and no dirt on the floor. Just foot tracks, nothing shaken down or anything like that. The inside of the pullman car was in a normal condition (R. 276-277). Did not look for a card table; card tables are attached to the cars. There are wall brackets and there are two lugs; these lugs are placed in the wall and the table comes to its normal position with these lugs in the wall. There is a folding leg on the end of the table that is not attached to the wall. The top portion of the table is approximately ½ inch thick (R.277-278). The wheel opposite, or the mate wheel of the broken wheel was on the

rail when Schroder arrived there. The broken wheel was not off the track, it was on the right side, referring to the movement of the train (R. 278).

The testimony of Dr. Cline, of the witness George O'Rullian, and Lee Walker, some of defendant's witnesses, is not set forth herein for the reason that their testimony is in connection with the plaintiff, A. G. Stanger.

Defendant's witness, Claude R. Pflasterer, metallurgical engineer for the Union Pacific, has been doing that work since 1921. He is a licensed professional engineer. There is no mistake but what the brake started on the back side, or the flange side of the wheel and extended to the outside. Wheels are inspected by Union Pacific wheel inspectors after they are made under certain specifications. This witness testified that the cause of the breakage in this wheel was due to internal stresses (R. 289). The wheel broke at or in the plate. The rupture was from the inside face, the flange side, outward. The edge of the outside is serrated, irregular (R. 291). This particular wheel was manufactured, rolled in 1928 (R. 292-293). Stresses such as were in this wheel develop during manufacture. The thing that caused this wheel to break was in there since the wheel left the mill (R. 295-296). He did not know as to whether the gauge was wide or tight at the time of the wreck. You can break steel in cold weather easier than when it is warm (R. 298). Climatic conditions do have an effect. Wheels do break because of friction, brake shoes, etc. He had heard of heat brakes and axles burning off and hot boxes. Any wheel may break because of these conditions. Wheels do break from friction heat and develop cracks (R. 298-299).

ARGUMENT

I.

(We will refer to the parties with respect to the position they occupied in the court below, as "Plaintiff" and "Defendant")

Under this point will be discussed the binding force and effect of findings. We urge upon the Court to bear in mind that the trial court heard this evidence, saw all of the witnesses and made his Findings of Fact and Conclusions of Law. We doubt that it is necessary for us to point out any of the rules of law pertaining to Findings, but we do so in order that we may discharge that full measure of duty that we owe to our clients. In this connection, we beg the indulgence of the Court to allow us to urge that Findings will not be disturbed on appeal if they are supported by sufficient evidence; that this Honorable Court will not weigh the evidence, but must accept the Findings made by the trial court, unless no reasonable man could draw the conclusions that the trial court did from the evidence.

> Occidental Life Ins. Co. vs. Thomas, 107 Fed. (2d) 876.

Under the new Federal Rules, a Finding of Fact cannot be set aside unless it is "clearly erroneous" in that it is against the clear weight of the evidence.

> United States vs. State Street Trust Co., 124 Fed. (2d) 948;
>
> Fidelity & Deposit Co. of Maryland vs. Aberdeen Nat. Bank & Trust Co. 124 Fed. (2d) 973.

In so far as a finding of the trial judge who saw the witnesses depends upon conflicting testimony or upon credibility of witnesses, or so far as there is any testimony consistent with a finding, it must be treated as unassailable on appeal.

Wittmayer vs. United States, 118 Fed. (2d) 808.

In that same case this Court held that where the District Court's findings are based on conflicting evidence, such findings are presumably correct, and that unless some obvious error of law or mistake of fact has intervened, the findings will be permitted to stand on appeal.

Again, it has been held where a case is tried by the Court, its findings on questions of fact are conclusive upon appeal, no matter now convincing the argument is that upon the evidence the findings should have been different, unless there is no substantial evidence to support them, and the Appellant Court is bound by the lower court's findings unless "clearly erroneous."

Andrew Jergens vs. Conner, 125 Fed. (2d) 686;

McIntosh vs. Wiggins, 123 Fed. (2d) 316;

Corbett vs. Halliwell, 123 Fed. (2d) 331;

Walker vs. Lightfoot, 124 Fed. (2d) 3.

We urge upon the court that every question that is presented in this record there is either no conflict with respect to the Plaintiff's evidence, or there is merely a contradiction there-

of. So, the most the defendant can claim is that the judgment herein is one based upon conflicting evidence.

II.

The doctrine of res ipsa loquitur clearly applies in this case. That is so fundamental that it may well be designated as Hornbook Law.

In California Jurisprudence it is said:

> "It has been long and continuously settled that, in an action by a passenger against a carrier for injuries received a prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. This rule has been announced by the cases again and again. The occurrence of the accident raises the presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part; that is, that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff himself tends to show that the injury was occasioned by one of these causes. This rule is known as the doctrine of res ipsa loquitur. *Where, for example, the injury is caused by the derailment or overturning of a vehicle, upon the trial court it is only necessary for the plaintiff to prove the derailment or overturning and the injuries caused thereby. Having done this he may rest, for the presumption is that the derailment or overturning occurred through the negligence of the carrier, and the burden of proving that there has been no negligence is cast upon the latter. How the derail-*

ment or overturning occurred or what was its cause is no part of the plaintiff's case. The fact that the vehicle derailed or overturned is all that he need establish in order to recover for such injuries as he may have sustained."

4 Cal. Jur. page 980, Sec. 119.

In a late pronouncement by the Supreme Court of the State of California it is held with respect to the doctrine of *res ipsa* loquitur:

> "It is clear that an inference of the truth of facts essential to a cause of action will support a judgment which may be rendered in accordance with such facts. 19 Cal. Jur. pp. 704, 717. And although to the comprehension of a trial judge, evidence to the contrary of such an inference may greatly preponderate, nevertheless the ultimate question of the weight that should be accorded to the evidence which may have been presented by the respective parties to the litigation is one for the exclusive original determination by the jury."
>
> Gish vs. L. A. Ry. Corp. 13 Cal. (2d) 570, 90 Pac. (2d) 792.

Of course, that case was tried before the court and a jury, but such is not the case here. The court only tried the case here, and while it is true his finding would have the same force and effect as a verdict of the jury, we believe that it should be entitled to greater consideration.

The Supreme Court of Arizona said:

> *"The record discloses no proof of negligence by the plaintiff other than the proof of derailment and wreck.*

The testimony of several witnesses was introduced by the defendant to establish the good condition of the track and the careful handling of the train, but whether the testimony of these witnesses was sufficient to rebut the presumption of negligence arising from the facts proven was a question of fact for the jury and would depend upon the weight given by the jury to the testimony of the witnesses, the effect as considered by the jury of the facts and circumstances surrounding or attending the derailment of the train, and on this issue the jury has found against the appellant."

Southern Pacific Co. vs. Hogan, 108 Pac. 240; 13 Ariz., 34; 29 L. R. A. N. S. 813.

Again it has been said:

"Under the doctrine of res ipsa loquitur, defendant must explain in some degree; that degree being sufficient to rebut the inference of negligence which comes to the aid of the plaintiff's case under the doctrine of res ipsa loquitur. Scarborough vs. Urgo, et al, 191 Cal. 341, 216 Pac. 584, supra. *However, if there should be some evidence that could be deemed an explanation, then the whole case was one for the determination of the trial court as to whether or not the explanation was sufficient to balance or overcome the inference raised under the doctrine of res ipsa loquitur. If the finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside any more than it is within its power to set aside any other finding supported by the evidence."*

Ireland vs. Marsden, 291 Pac. 912; 108 Cal. App. 632.

Again it has been held:

"Respondents further argue that, even conceding that doctrine (res ipsa loquitur) to be applicable, it

> merely placed upon the defendants the burden of going forward with the evidence in explanation of their conduct and 'having explained their conduct the defendants have done all required of them by the doctrine.' Thereupon respondents apparentaly draw the conclusion that a directed verdict in their favor was proper stating that 'there is nowhere to be found a case holding that the presence of the doctrine prevents a directed verdict." We are not called upon to decide the question of whether a directed verdict in favor of defendant should ever be granted in a case where the plaintiff has made out a prima facie case under the doctrine referred to. There is no doubt, however, the question of whether a defendant has made the showing required to rebut such prima facie case (citing authorities) is ordinarily one for the jury."
>
> Karsey vs. City and County of San Francisco, 20 Pac. (2d) 751; 130 Cal. App. 655.

The law unquestionably is that whether or not the defendant has sufficiently explained the happening as required by the doctrine of *res ipsa loquitur* is a question of fact for the court or jury trying the case.

> Michener vs. Hutton, 265 Pac. 238, 203 Cal. 604; 59 A. L. R. 480;
>
> May Department Stores Co. vs. Bell, 61 Fed. (2d) 830;
>
> Bourgnignon vs. Peninsular Ry. Co., 181 Pac. 669, 40 Cal. App. 689.

The Court of Appeals of the District of Columbia, in dealing with the doctrine of res ipsa loquitur, had this to say:

"Now, it is not for the court to determine the question of the truth of the explanation given; that is peculiarly the province of the jury. The plaintiff has proved a prima facie case of negligence; the defendant has offered an explanation which tends to show that there was no such negligence. This raises a disputed question of fact, proper to be passed upon by the jury, under instructions duly formulated by the court for the purpose. Unless, therefore, we are to adopt the theory that the plaintiff's prima facie case only lasts until the defendant has offered some explanation, and that such explanation, whether true or false, destroys the presumption of negligence raised by plaintiff's proof, and casts upon the plaintiff the necessity of proving by additional testimony in rebuttal, that, notwithstanding the explanation ,there was in fact negligence on the part of the defendant, there is no escape from the conclusion that the case must be submitted to a jury. But we find no warrant in reason or in adjudicated cases for such a theory. No case has been pointed out which holds such a doctrine. No case has been pointed out where a verdict has been directed for the defendant because the defendant's explanation has tended to controvert the presumption of negligence, and the explanation itself has remained uncontroverted by testimony in rebuttal. We find that in all the cases the question of defendant's negligence, under such condition of the testimony, has been submitted to the jury for its determination."

Kohmer vs. Capital Traction Co., 22 App. Dec. 181; 62 L. R. A. 875, at page 877 (middle right-hand column).

A jury is not bound to believe an explanation.

Texas & Pacific R. Co. vs. Carlin 189 U. S. 354, 23 S. Ct., 585, 47 L. Ed. 849.

In the last cited case of course, it was tried before a court

and jury, but here, as we have pointed out, our case was tried before the court only and the court found in our favor.

> "It is argued here that the court should have directed a verdict for the plaintiff in error, and that error was committed in permitting a recovery to be had upon the theory that it was negligent in failing to have a flagman or gates at the crossing. Where a passenger is injured by a derailment of a train, there is a presumption of negligence on the part of the carrier, which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against it for such derailment, is considered prima facie a breach of the contract to carry safely. Patton vs. Texas & Pacific Ry. Co., 179 U. S. 663, 21 S. Ct. 275; 45 L. Ed. 361, Gleeson vs. Virginia Midland R. Co., 140 U. S. 435; 11 S. Ct. 859; 35 L. Ed. 458, Plumb vs. Richmond Light Co., 233 N. Y. 285 135 N. E. 504; 25 A. L. R. 685. The fact of the occurrence warrants the inference of negligence, and the doctrine of *res ipsa loquitur* comes into application. This means that, when the evidence is all in, the question before the jury is whether the preponderance is with the plaintiff. The explanations made, especially if given by interested witnesses, are for the jury. Chicago vs. Irving, 234 Fed, 562; 148 C. C. A. 328."
>
> Lehigh Valley R. Co., vs. Ciechowski, 10 Fed. (2d) 82.

In the case of Sweeney vs. Erving, the Supreme Court of the United States said, in dealing with this doctrine:

> "In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence

> to be weighed, not necessarily to be accepted as sufficient; that they call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict * * * When all of the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."
>
> 228 U. S. 233; 33 S. Ct., 416; A. C. 1914 D, 905
> 57 L. Ed. 815;

In concluding this portion of our discussion, we call attention to the fact that there are many questions upon which the Railroad Company offered no explanation whatever. For instance, there is no evidence in this record that in the more than ten years that this wheel was used that it was ever inspected. The only explanation that they attempted to make was that of the purported expert, an employee of the Railroad Company and an interested witness, Claude R. Pflasterer (R. 276). This witness testified merely that he made an analysis of the broken parts of this wheel and that the defect was a stress that had been in there since its manufacture; that what caused the wheel to break was there during the manufacture (R. 290). As we shall presently see, the manufacturer of equipment for a common carrier is its agent, and the common carrier is responsible for the negligence of the manufacturer. That being true, there is no explanation whatever in this case of why the manufacturer did not discover this defect or what care was exercised by it, if any, to discover it. There isn't any evidence in this record even that the manufacturer was a reliable one. Evidence of an employee that he made an inspection does not overcome the doctrine of res ipsa loquitur.

Volkmar vs. Manhattan R. Co., 134 N. Y. 418; 31 N. E. 870; 30 A. L. R. 678;

Davis vs. Paducah, R. & L. Co., 68 S. W. 140, 113 Ky., 267;

Chicago, M. & St. P. R. Co., vs. Irving 234 F. 562.

III.

We next pass to a consideration of opinion evidence destroying the question of fact or converting the question into one of law where otherwise there would be a question of fact involved. In the first place, let us point out that opinion evidence can never destroy a question of fact, and opinion evidence is not binding upon a trier of fact. As to whether opinion evidence will be accepted or rejected is for the trier of facts.

If the rule of Erie R. R. Co. vs. Tompkins, 304 U. S. 64, 82 L. Ed 1188, 58 S. Ct. 817, 114 A. L. R. 1487, is adhered to, then the rule obtaining in Idaho where this case was tried with respect to opinion evidence would control here, and in this connection, the Supreme Court of Idaho has held that an expert's testimony as to his opinion is not evidence of a fact in dispute, but is advisory and admissible only to assist triers of fact to understand and apply testimony of other witnesses.

Evans vs. Cavanagh, 58 Ida. 324; 73 Pac. (2d) 83;

Ninstad vs. Wenton Lbr. Co., 99 Pac. (2d) 52; 61 Ida. 1.

But at any rate, the weight to be given expert evidence is entirely left to the court or jury trying the case and it is not binding upon a trier of fact in any respect.

Burns vs. Osborn-Fitz-Patrick Finance Co., 282 Pac. 419, 101 Colo. 680;

20 A. Jur. 1059, Sec. 1208;

So. Pac. Co. vs. City of Los Angeles, 55 Pac. (2d) 847; 5 Cal. (2) 545;

City of Elsinore vs. Temescal Water Co., 97 Pac. (2d) 274; 36 Cal. App. (2) 116;

May vs. Farrell, 271 Pac. 789;

10 C. J. 972, Sec. 228;

Anderson vs. B. & O. Ry. Co., 96 Fed. (2d) 796;

22 C. J. 728.

The Supreme Court of the United States, in dealing with opinion evidence generally, speaking through Mr. Justice Cardoza said:

> "But plainly opinions thus offered, even if entitled to some weight have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally whether addressed to a jury (citing authorities) or to a judge (citing authorities) or to a statutory board."

Dayton Power & Light Co. vs. Public Utilities Comm. 292 U. S. 290; 54 S. Ct. 647; 78 L. Ed. 1267.

In Cal. Jur. it is said:

> "However, it is well established that a jury, or a judge sitting as a jury, is not concluded by the testimony of experts. The province of such testimony is only to aid in coming to a conclusion; and does not exclude consideration of other evidence which is pertinent to the issue involved. Even if several competent experts concur in their opinions, and no opposing opinion is offered, the jury are still bound to decide the issue upon their own judgment, assisted by the statements of the experts. Obviously, the fact that a witness is an expert does not cause additional significance to attach to his testimony in regard to self-evident facts. It is for the trial court, and not the court of review, to determine the weight to be given to such evidence, and when there is a conflict between scientific testimony and testimony as to facts, the jury or trial court must determine the relative weight."
>
> 10 Cal. Jur. 972.

> "Here the jury was not bound to accept the expert testimony given by appellant's witnesses. (Michener vs. Hutton, supra, quoting approvingly Volkmar vs. Manhattan Ry. Co., 134 N. Y. 418; 31 N. E. 870; 30 A. St. Rep. 678.)"
>
> Brandes vs. Rucker-Fuller Desk Co., 282 Pac. 1009, 102 Colo. 221.

The last cited case involved the doctrine of *res ipsa loquitur* and it was squarely and directly held that the inference of negligence arising from it could not be overcome by expert or opinion evidence. The question there involved was an allegedly latent defect in a part of a motor vehicle. We submit that that case is directly in point in our favor here.

IV.

The law undoubtedly is that whoever manufactures the equipment for a common carrier of passenger is regarded as the agent of the common carrier, and the fact that it was manufactured in an independent establishment makes no difference and the negligence of such manufacturer is chargeable to the common carrier, or differently stated, the purchase of defective machinery from another is no defense.

It has been held in an English case that:

> "In an action against a railway company for compensation for injuries received by the plaintiff by the breaking down of a bridge over which he was passing in a passenger train, it was held that it was a proper question for the jury whether the defendant had engaged the services of competent engineers, who had adopted the best methods and had used the best materials, and that, if the defendants had done so, they would not be responsible; but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident arising from a deficiency in the work."
>
> Grote vs. The Chester and Hollyhead Ry. Co., 1848 2 Ex. 251; 154 Eng. Rep. 485.

This case by no means is the full measure of the length that the English court has gone on this question.

> "The coach proprietor is bound to convey his passengers in a road-worthy vehicle and if an accident happened from a defect in the construction, the proprietor is liable, although the defect be out of sight and not discoverable upon ordinary examination."

Sharp vs. Grey, 2 Moo. and S. C. 620; 21 L.J.C.P. 45; 9 Bing. 457; 131 Eng. Rep. 684.

It is stated in connection with this case and where the above rule of law was laid down, to-wit:

> "Assumpsit against a coach proprietor and common carrier, for failing in his undertaking to convey the plaintiff safely from Chertsey to London. The axeltree of the defendant's coach broke on the journey whereby the plaintiff was thrown off, his limbs fractured, and considerable loss and expense incurred in his cure. It appeared that the axeltree was an iron bar, which, excepting the arms projecting into the wheels, was encased in a frame of wood consisting of four pieces bound together by clamps of iron. The clamps were fastened with screws. Before the journey the defendant's servants had examined part of the vehicle in the usual way, when no defect was obvious to the sight; but upon investigation after the accident, a defect was discovered in that portion of the iron bar which, being embedded in the woodwork, could only be examined by unscrewing the iron clamps and taking off the wooden frame."

Sharp vs. Grey, Supra.

This was held not to be any defense. In the case at bar there never was an examination of this car or its wheels, so how can it be said that there has been a compliance with the law that imposes the duty of careful inspection and maintenance upon the common carrier? A plea wherein it was averred that a locomotive, the crankbeam of which broke, was purchased from competent manufacturers, although it was not made by the railway company, was held by the Irish court to be demurrable, it being stated:

> "Their plea does not contain any averment as to the care and skill applied in the manufacture of the engine, nor as to the care and skill exercised by (the company) in the selection or inspection of it. All the averrance and their pleas are quite consistent with gross culpable carelessness on the part of the manufacturers and with gross and culpable negligence on the part of the purchase of it from the manufacturers."
>
> Burns vs. Cork B. Ry. Co., 13 Irish C. L. Rep. 543.

The same thing can be said in the case at bar, all of the evidence of the defendants is quite consistent with gross and culpable negligence of the defendants or the manufacturer because there is no evidence of an inspection by defendants at any time since the wheel was put into service more than twelve years prior to the time that the accident occurred, or any care on the part of the manufacturer during the process of fabrication of the wheel.

We do not have to cross the Atlantic Ocean for authority. There is an abundance of it here in the United States, as we shall presently see. The Supreme Court of California has held:

> "When a passenger is injured by the derailment of a train, the fact of such an accident raises the prima facie presumption of negligence, which the railway company has the burden of overcoming by clear and explicit proof that the accident could not have been avoided by the utmost practical care and diligence, and that it proceeded from something against which no human prudence or foresight on the part of the company could provide. 3 Thompson on Negligence (2nd Ed.) Prs. 2909, 2910; Fairchild vs. California Stage Company, 13 Cal. 599, 604; McCurrie vs. Southern Pacific Company, 122 Cal. 588, 561; 55 Pac. 824.

That such is the law is admitted by the appellant. Upon the state of the evidence, however, it claims exoneration in the instant case. It relies first upon the stipulated fact that it purchased the rail forming a part of its track from a manufacturer of reputation, and, second, that after employing all reasonable care and skill for the purpose of detecting any weakness in the rail, the defect which was the cause of the accident remained undisclosed and, in fact, could not be discovered by means of the examination which the defendant made. The precise question we are here confronted with was elaborately considered by the Supreme Court in this State in Treadwell vs. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 598, 13 Am. St. Rep. 175. So completely is the matter there discussed and so thoroughly are the authorities examined and quoted from that the decision may be said to be the leading case in California upon the subject. It was there said (80 Cal. 588, 22 Pac. 270, 5 L. R. A. 598, 13 Am. St. Rep. 175). 'The doctrine of the American courts is still more strict and explicit, and the general current of the authorities is that the carrier of passengers is bound to the utmost care and diligence of very cautious persons, and is responsible for any, even the smallest negligence; holding their undertaking to be to carry their passengers with safety as far as human care and foresight can go.' It is settled by that decision, and seems to be well established by the cases therein examined and cited that appellant was not excused from the degree of care and diligence pointed out, by the fact that the rail in use was constructed by a competent and skilled manufacturer, from whom it purchased it. The manufacturer was its agent or servant in the rolling of the rail, and it is responsible for any want of care of the maker. The obligations of care and foresight rested upon the defendant using the rail, and it can not shift it from itself to another person. Whether the rail was manufactured in the workshop of the defendant by agents employed for that purpose or by a manufacturer engaged in the business of sup-

plying such articles for sale, defendant was bound to see that in its making no care or skill was omitted. 'When such care and skill has been exercised, the defendants duty in this respect has been discharged. If, on the other hand, a defect exists in the construction which might have been detected and remedied, they are answerable for the consequences' Hegman vs. Western R.R. Corp., 16 Barb (N. Y.) 353, 356, (citing approvingly Treadwell vs. Whittier, Supra, 80 Cal. 588, 22 Pac. 270, 5 L. R. A. 598, 13 Am. St. Rep. 175). Following the Treadwell case, the Supreme Court has steadfastly adherred to the doctrine there laid down that in this state a common carrier is responsible for defects which, even though not discoverable after the instrumentality came into its possession, could have been discovered by the most careful and thorough examination during the process of manufacture. Siemsen vs. Oakland S. L. & H. Ry., 134 Cal. 494,499; 66 Pac. 672; Jacobi vs. Builders' Realty Co., 174 Cal. 708, 710; 164 Pac. 394; L. R. A. 1917E, 696; Treadwell vs. Whittier, Supra, 80 Cal. p. 594 et seq., 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. In view of the above rule so strongly drawn in this state, we feel that the lower court could not say, as matter of law, that the defendant had successfully met the burden imposed upon it by plaintiffs' prima facie case. Defendant's only witness as to the latent defect and its cause never had any practical experience in the manufacture of or science of making rails. So far as the record discloses he was never in any way connected with such work. There was no evidence as to the processes or care employed in the rolling mills to eliminate slag from the rails, or as to tests, or of examination in their manufacture. The effect of the evidence, as we view it, is that, after the rail was made and purchased by defendant, such defects in its inner fabric are not discoverable, cannot be, and, as matter of fact, in the instant case, were not, disclosed by "the usual and

ordinary" methods of inspection pursued by defendant."

Morgan vs. Southern Pacific Co., 187 Pac. 74, 76, 77;

45 Cal. A. 229.

We could quote from the case of Siemsen vs. Oakland, S. L. & H. Ry., and Treadwell vs. Whittier, but that would be merely to multiply authorities. We may say, however, that the Treadwell vs. Whittier case is one of the leading cases throughout the United States and has been repeatedly cited with approval.

Now, then, let us see how the facts of the case before this honorable court fit into the situation here. The railroad company there was not excused for a defect that was caused by or due to the neglect of the manufacturer. And it was stipulated that the manufacturer of the rail was a reputable one. There was no attempt in the case at bar to show that the car or wheel in question were bought from a reputable manufacturer, the identity of the manufacturer is unknown. There is not the slightest intimation in the case at bar as to what care, if any, the manufacturer used in making this car wheel. There is not any evidence whatever that Mr. Pflasterer, as the California court said, ever had any connection with the manufacture of the car or wheel, or any car or any wheel, or knew anything about it. In other words, the language of the California court:

"Defendant's only witness as to the latent defect and its cause never had any practical experience in the manufacture of or science of making 'wheels.' So far as the record discloses he was never in any way con-

> nected with such work. There was no evidence as to the processes or care employed in the making of "wheels" to eliminate 'stresses' from 'wheels,' or as to tests, or of examination in their manufacture."

The Supreme Court of the United States held:

> "Persons transported in such conveyances contract with the proprietor or owner of the conveyance and not with their agents as principals, and the question of the liability of the proprietor or owner is wholly unaffected by the fact that the defective ship, car, engine or other apparatus was purchased of another, if the defect was one that might have been discovered by any known means."
>
> Steamship City of Panama vs. Phelps, 101 U. S. 453;
>
> 25 L. Ed. 1061, 1065 (upper left hand column).

So far as the evidence goes in the case at bar, the defect in this wheel could have been readily discovered during the process of manufacture. Or after it was manufactured and before it was placed in service more than twelve years before this accident occurred. To say nothing of the fact that not even the slightest inspection was ever made of this wheel or car after it was placed in service and before this wreck occurred.

It was held in Hegeman vs. Western Ry. Co., 616 Barb. 353, 13 N. Y. 9, 64 Am. Dec. 517, and approved in Treadwell vs. Whittier, supra, that the failure to discover a defect in an axle which could have been discovered only by bending the axle, constituted negligence.

A railroad company may not escape liability by show-

ing that a passenger was injured as a result of a defect in a car, not owned but being used by it at the time.

Morgan vs. Chesapeake & Ohio Ry. Co., 105 S. W. 961; 127 Ky. 433; 15 L. R. A. N. S. 790; 16 Am. Cas. 608.

V.

The defendant seeks to palliate its culpability by reason of Mrs. Stanger's prior alleged weakened or diseased condition.

We submit, in the first instance, that the trial court was fully warranted in finding that her present condition was due entirely to these injuries she sustained or received, at the time this wreck occurred. And that there is ample evidence in the record to justify and support such a finding. It should be remembered that even the Railroad Company's doctor admitted under cross-examination, that injury or accident, could have caused her condition. We refer to Dr. Brother's testimony (R. 257). It is indeed strange that if Mrs. Stanger was in substantially perfect health and had been for several months prior to the accident and before she was injured, as she so testified, and was in better condition than she had been for a long time, and had been in perfectly normal health (R. 133-134) that immediately and in fact at the scene of the wreck, while standing upon the ground after she had been assisted from the wrecked car, this excessive flowing of blood commenced and continued until after she had been operated on by Dr. Hatch and her uterus removed (R. 132-133). The trial judge heard the testimony of this witness and observed her demeanor upon the witness stand, as he did all of the wit-

nesses testifying in this case. The trial court believed the testimony of Mrs. Phyllis Stanger. And we submit that there is ample testimony of other witnesses to support the testimony of Mrs. Stanger.

> "Increased injuries sustained by a plaintiff by reason of her diseased condition at the time of the accident occurring from the defendant's negligence does not constitute special damage which must be pleaded in order to be recovered. Where the plaintiff at the time of an injury, by reason of defendant's negligence, was suffering from disease and such injury hastened the development of the disease and aggravated the same, she was entitled to recover for such increased injury."
>
> (Syl. 3 and 4).
>
> Campbell vs. Los Angeles Traction Co., 137 Cal. 565; 70 Pac. 624.

This case also holds that the weak, sick, infirm and halt, have the same right to the protection of the law against hurt or injury that the healthy and strong may demand.

We do not, however, for one second concede or admit that this is a case where there was merely an aggravation of a diseased condition. We submit, and most earnestly insist, that the trial court correctly found that the defendant was responsible for the injuries Mrs. Stanger sustained and for the resulting operation, and her present condition.

This court held that the following instruction correctly laid down the law:

> "You are instructed that if you find from the evidence that the plaintiff received the injuries

complained of by reason of defendant's negligence, alleged in the complaint, and that at the time of the reception of such injuries the plaintiff had been suffering from some disease, and further find that such injuries hastened the development of the disease, and that to be without the fault of the plaintiff the present condition, whatever you may find that to be, has resulted from such injuries, then I instruct you that the plaintiff is entitled to recover such damages as you may determine he has sustained from the injuries."

Southern Pacific Company vs. Cavin, 144 Fed. 348 at page 351.

Again it has been held that:

"Where a plaintiff was in good health prior to a personal injury due to defendant's negligence, but the shock of such injuries produced delirium tremens by reason of which and of his acts during delirium tremens his recovery from the injury was retarded and rendered less complete, the fact that his susceptibility to the disease was the result of his own voluntary acts, cannot be considered in mitigation of damages, the defendant is liable for all damages resulting from the disease, as well as from the original injury."

(Syl.)

Magurire vs. Scheen, 117 Fed. 819; 54 C. C. A. 642; 59 L. R. A. 496.

The Supreme Judicial Court of Massachusetts has held:

"If her previous habits had been such as to lessen the probability of her complete recovery or to prolong or to aggravate the suffering caused by her injury, that fact could not be shown in mitigation of damages."

Sullivan vs. Marin, 175 Mass. 422; 56 N. E. 600;

See also 1 Thompson on Negligence, Sec. 150.

The question of damages is one for the trial court and should not be disturbed in this court, amount of damages being a question of fact. This court is not the trier of facts. This court is without the advantage of hearing the various witnesses testify and is unable to and does not observe the demeanor of the various witnesses on the witness stand or their demeanor or manner of testifying. These, are among some of the many regular, sound and established principals of jurisprudence, why the question as to the amount of damages should be settled in the trial court.

We submit that the argument of defendant's counsel appearing at page 43 of their brief is wholly inapplicable to the case now before this court. It seems to us that counsel feels himself in the position of the proverbial drowning man grasping at a straw. Counsel cites from 55 Corpus Juris (brief of appellant, page 43), in the same work we find this textual statement.

> "The fact that plaintiff is afflicted with a disease or weakness which has a tendency to aggravate the injury will not prevent defendant's wrongful act from being regarded as the proximate cause. 25 C. J. page 479."

The Supreme Court of the State of Idaho has laid the law down to be, and by the way, defendant's counsel relies upon this case, that:

"If you find from the evidence that the plaintiff was caused to fall by a defect in the sidewalk negligently permitted to exist by the defendant, the defendant is responsible for all ill effects which naturally and necessarily follow the injury in the condition of health in which plaintiff then was at the time of such fall, and it is no defense that such injuries may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health at the time, or that by reason of latent disease the injuries were rendered more difficult to cure by reason of plaintiff's state of health at that time ,or that by reason of latent diseases the injuries were rendered more serious to her than they would have been to a person in robust health."

Jones vs. City of Caldwell, 20 Ida. 5, 12-13; 116 Pac. 110; 48 L. R. A. N. S. 119.

Counsel cites this case in the quotation contained on page 44 of appellant's brief; so we contend with respect to the matter of any ill health on the part of the plaintiff, Mrs. Stanger, that this was merely a question of fact for the lower court, and the lower court having passed upon this question and having found in favor of the appellee, such finding by the lower court should not be disturbed here.

VI.

We contend further that the question of damages under the rules laid down by this court and by the Supreme Court of the United States is a matter for the trial court and will not be disturbed by this court on appeal.

The Supreme Court of the United States has said:

"Whether the verdict was excessive is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here. As stated by us in Aetna Life Insurance Company vs. Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371, 'It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.' 140 U. S. 91 (35:339 citing numerous cases), Ny. L. Erie and Western R. R. Co. vs. Winter 143 U. S. 60; 12 S. Ct. 356; 36 L. Ed. 71. (This case cited and the language approved by this court in Southern Pacific Co. vs. Cavin, Supra.)

The Supreme Court of the United States again said:

"The argument on behalf of the plaintiff in error proceeds upon the assumption that this court may review the evidence as to negligence and as to the damages recoverable, and may reverse the judgment if the court is dissatisfied with the findings of the jury. This, however, is not the province of the court upon writ of error. If there was evidence proper for the consideration of the jury, the objection that the verdict was against the weight of the evidence, or that the damages allowed were excessive, cannot be considered. (Citing numerous cases)."

Herencia vs. Guzman, 219 U. S. 44; 31 S. Ct. 135; 55 L. Ed. 81, 82.

This court has held in Gates vs. General Casualty Company of Am., 120 Fed. (2d) 925, 927.

> "Appellants contend that the court's finding of misrepresentation and concealment is not sustained by the evidence. On this issue appellants must show the court's findings are 'clearly erroneous.' Due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses," all but one of whom was heard by that court."
>
> "Referring to Rule 52 (A) Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723 C.

To the same effect see Gary Theater Company vs. Columbia Pictures Corporation, (7th Cir.) 120 Fed. 891.

Again this court has said:

> "There is sharp conflict in the evidence, and of course it is not encumbent upon this court to reconcile such conflict or to weigh evidence; our sole duty is to determine whether there is any substantial evidence to support the findings of the court below."
>
> Babbitt Brothers Trading Co. vs. New Home Sewing Machine Co., 62. F (2d) 530, 533.
>
> See also Champion Spark Plug Co. vs. Reich (8th Cir. 1941) 121 Fed. (2d) 769, 772.
>
> "If the findings of the trial court have substantial support in the record, we are not warranted in overturning them unless they are found to be clearly erroneous, and in the determination of this question, we must give due regard to the opportunity at the trial to judge the credibility of the witnesses."
>
> Federal Rules of Civil Procedure, Rule 52 (A) 28

U.S.C.A. following Sec. 723 C. Grey vs. United States, 8th Cir., 109 Fed. (2d) 728.

The Supreme Court of the United States has held that:

"The excessiveness of an award for pain and suffering of a deceased railway employee in an action brought under the Federal Employers' Liability Act is a question of fact which is not open to revision in the Federal Supreme Court on writ of error to a state court."

St. Louis Iron Mountain and Southern Railway Co. vs. Craft, 237 U. S. 648; 59 L. Ed. 1160; 35 S. Ct. 704. (4th Syl.)

From the same case we quote further:

"Finally, it is said that the award of $5000.00 for damages for pain and suffering even though extreme, for so short a period as approximately thirty minutes, is excessive. The award does seem large, but the power, and with it the duty and responsibility of dealing with this matter rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here."

Citing numerous cases. St. Louis I. M. and S. Ry. Co., vs. Craft, supra.

Again the Supreme Court of the United States held:

"But a case of mere excess upon the evidnce is a matter to be dealt with by the trial court."

Southern Railway-Carolina Division vs. Bennett, 233 U. S. 80; 58 L. Ed. 860, 34 S. Ct. 566.

"The contention that the verdicts are against the

weight of the evidence cannot be considered, as this court can go no further than to determine whether there is substantial evidence to support them. Nor is it the province of this court to determine whether the verdicts are excessive. That question lay with the court below upon the motion for a new trial."

Grand Trunk Western Ry. Co. vs. Heatlie, 48 Fed. (2d) 759.

Among other cases cited in support of the above is:

"The trial court's judgment is based upon conflicting evidence. After a careful examination of the record we are unable to say that the court's findings are clearly erroneous. Rule 52 (a), Federal Rules Civil Procedure, 28 U. S. C. A. following Sec. 723c. We think it unnecessary to discuss the evidence in detail. We are impressed, as undoubtedly was the trial court, with the testimony of the witness Parks relative to the building up of the land in dispute by flood waters of the river * * * The findings of the trial court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. Silver King Coalition Mines Co. vs. Silver King C. M. C., 8th Cir., 204 Fed. 166, 177 Ann. Cas. 1918B, 571. The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52 (a), 28 U. S. C. A. following Sec. 723 c), is but the formulation of a rule long recognized and applied by courts of equity. Guilford Const. Co. vs. Biggs, 4 Cir., 102 Fed. (2d) 46, 47. As was said by Mr. Justice Holmes in Adamson vs. Gilliland, 242 U. S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing Davis vs. Schwartz 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is preeminently one for the application of the practical rule, that so far as the findings of the trial

judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable'."

Wittmayer vs. United States 118 Fed. Rep. (2d) 808, 810, 811.

"The only real issue in the case is therefore whether the storms which this ship met caused any part of the damage, and how much; these are questions of fact and the judge has found them against the defendant. The record would not justify us in saying that his finding was "clearly erroneous," Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723 c, even though we should not have reached the same result ourselves, and we might well have found exactly as he did. True, it would seem as though the sounding of a ship in an ordinary seaway might account for much—perhaps all—of this kind of damage; but the truth seems to be otherwise for rubber cargoes come through quite regularly with good outturn, unlike that at bar. This being datum, it is impossible to see what else but the storms could have so injured this parcel, for the stowage was good; and the judge was certainly not bound to accept the defendant's expert testimony."

Hecht, Lewis & Kahn, vs. New Zealand Insurance Co., 121 Fed. (2d) 442.

Counsel for appellees feel constrained to make this observation of the numbered paragraphs appearing in appellant's brief contained on pages 55 and 56. R. 19 refers to a portion of the findings of fact and conclusions of law. R. 43, if we interpret clearly refers to notice of appeal and petition for approval for supersedeas and stay on appeal, and does not

refer to the evidence except as the court found the same from the testimony which we submit conclusively shows that the plaintiff, Phyllis Stanger was struck in the abdomen and this is undisputed (R. 127-128).

Answering paragraph II, the evidence is conclusive that the operation performed upon Phyllis Stanger in July following the January in which she was injured was caused by the injuries she sustained in the derailment, and the findings of the court and the record in this case amply supports the same. Appellant's statement number III is positively misleading, and just to the contrary. The evidence is that prior to this derailment and the injuries received Phyllis Stanger was not nervous, and in better health than she had been for several years prior, she was able to rest and sleep at night, and that in support of her own testimony is the testimony of Dr. Hatch, stating as to her nervous condition at the time he saw her 7 months after this accident occurred.

Again in answer to paragraph IV, the evidence on the entire record is to the contrary absolutely. The sterility of Mrs. Stanger was directly and proximately caused by the injuries she sustained at the time of the wreck or derailment with its resulting injuries.

In answer to paragraph V we submit upon the face of it, it is begging the issue, is silly, and without foundation in truth and absolutely contrary to the testimony and the record in this case.

Likewise in paragraph VI there is no doubt as to what appellant's counsel would desire the record to show, in this

case. We submit upon the record that following this accident, the same day it occurred, Mrs. Stanger was given treatment by a Railroad doctor whom the plaintiff testified she did not know. That she was unable to sleep on the pullman car on the trip from Denver to Houston, and after she arrived at Houston, Texas, she remained most of the time in bed, as she did throughout the remainder of the trip and after she arrived at home. After the trip she remained in bed at home for many weeks and months following the time the derailment occurred.

And paragraph VII again is likewise a pure conclusion on the part of counsel for appellant. There is positively nothing in the record to show that the court did not differentiate between the condition of the plaintiff before the derailment and the resulting injuries and the condition that existed after the same.

There is another matter that thus far appellee has not called to the attention of this honorable court, and that is this: The engineer of this train was the only member of the train or engine crew that was called by the Railroad Company to testify in this case. The train and engine crew consisted of the engineer and fireman, a train conductor, and two brakemen. This was admitted by appellant's witness, Mr. John A. Schroder (R. 271-272) under cross-examination. No reason was given by the appellant here for not calling these witnesses. They knew who they were and are, and they were their own hired employees. Yet the trial court and this honorable court is left in the dark as to what these witnesses would have said had they been called to testify. And we make this inquiry, is it reasonable to assume that they would have tesified favorably

for the Railroad Company and yet they did not call them? Or is there another presumption that arises from a failure of a party to call witnesses who were in the position of their fireman, who was with engineer Lewis on this train, and the train conductor and their two brakemen?

There was a fireman on the same engine with defendant's engineer Lewis. The defendant knew his name. What would he have said as to how the engine rode passing over the particular piece of track where this wreck occurred, had he been called by the defendant to testify?

There is a presumption that arises from the failure of a party to produce evidence which is within his knowledge, which he has power to produce, and which he would naturally produce if it were favorable to him, gives rise to an inferrence that if such evidence were produced it would be unfavorable to him.

22 C. J. Sec. 53 p. 111;

Kirby vs. Tallmadge, 160 U. S. 379, 16 S. Ct. 349, 40 L. Ed. 463;

And cases cited under footnote 54.

See also:

22 C. J. p. 115 Sec. 56;

10 R. C. L. Sec. 32 p. 884, and cases cited therein.

The Supreme Court of the State of Idaho has said regarding this matter:

> "When evidence tends to prove a material fact imposing a liability on a party, and he can produce evidence rebutting the case made against him, if it is not founded on fact but refuses to do so, it must be presumed that the evidence, if produced, would operate to his prejudice and support his adversary * * *

Garrett vs. Neitzel, 48 Idaho 727, 733; 285 Pac. 472;

The Supreme Court of the State of California has adopted with approval the following language:

> "It is a well settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is founded on fact, and he refuses to produce such evidence the presumption arises that the evidence, if produced would operate to his prejudice and support the case of his adversary."

Bone vs. Hayes, 99 Pac. 172, 175.

In this case numerous authorities are cited.

Missouri Pacific Ry. Co. vs. Kennett, 99 Pac. 269, 79 Kan. 232;

Lenover vs. Beckman, 142 Wash. 98, 252 Pac. 533.

We earnestly submit that the failure of the Railroad Company, appellant here, to call the fireman and at least the train conductor, who would know as to the condition of the inside of the train, should receive the careful consideration by this Honorable Court that the law says must be applied.

VII.

There is yet one more point to which we want to direct the attention of the Court, and that is the power or the rule of this court to overrule or set aside the judgment or opinion of a trial court on motion for a new trial. It has been uniformly held by this court that this court will not disturb a judgment where the trial court has either granted, or denied a motion for a new trial. Such was the procedure in the case at bar. The appellant duly made and presented to the court its motion for a new trial and after argument of counsel and due consideration by the court the motion for new trial was denied. Counsel for appellant in specifications of error and in specification No. 2, assigns as error the refusal of the trial court to grant its motion for a new trial, and as we have heretofore indicated, this court has uniformly held that if there is substantial evidence to support a judgment, that this court will not reverse a trial court in refusing to grant a new trial, and we call first to the attention of the court an Idaho case that was decided by this court on the point that we are now raising and discussing with the court and this court held in that case as follows:

> "The denial of a motion for a new trial in the federal court is within the discretion of the court, and where that discretion has been exercised, and there is evidence to support the judgment, as in this case, a motion is not reviewable on Writ of Error."
>
> C. & M. St. P. R. Co. vs. Chamberlin 253 Fed. 439.

In support of the above announced doctrine, this court in the last cited case cites,

Pickett vs. U. S. 216 U. S. 456-461; 54 L. Ed. 566.

We quote again,

"Granting or denying a motion for a new trial is discretionary with the trial court; only an abuse of discretion is assignable as error."

Spokane Ry. Co. vs. United States, 72 Fed. (2d) 443.

This was also a case that went up from Idaho and in the opinion this court cites

Mattox vs. U. S. 146 U. S. 140, 36 L. Ed. 917.

The United States Supreme Court has had this matter under consideration in a number of cases and has announced substantially the same rule as announced by this court in the last two quoted cases, and, of course, the rule announced by the United States Supreme Court is binding upon this court, and we quote the rule as laid down by the Supreme Court and which is supported by a long list of authorities:

"The rule that this court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals.

Fairmount Glass Works vs. Cub Fork Coal Co. et al, 287 U. S. 474, 488. 77 L. Ed. 439.

We submit from the above authorities that since there is substantial evidence in the record to support the judgment of the trial court that the trial court's refusal to grant a new trial upon a question of fact and other questions raised, is not reviewable by this court.

In conclusion we most earnestly submit that upon the entire record in this case there is competent, material, and substantial evidence to amply support each and every finding made by the trial court and competent, material, and ample testimony to support the findings of fact, conclusions of law and judgment that were made and entered by the trial court in this case. And that the judgment made and entered in this case by the trial court should be by this Honorable Court in all things affirmed, for which the foregoing is respectfully submitted.

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